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Nos. 89-1391 and 89-1392

In the Supreme Court of the United States

OCTOBER TERM, 1990

IRVING RUST, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

STATE OF NEW YORK, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Title X of the Public Health Service Act, which authorizes federal grants to support the provision of family planning services, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. The implementing regulations prohibit Title X grant recipients from providing, within their Title X programs, abortions or abortion-related services, including counseling clients about abortion, referring them to facilities that provide abortions, or engaging in abortion-related advocacy. The question presented is whether those regulations violate Title X, the First Amendment rights of grantees and pregnant women, or the Fifth Amendment rights of pregnant women to terminate their pregnancy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-67a) is reported at 889 F.2d 401. The opinion of the district court (Pet. App. 9a-32a) is reported at 690 F. Supp. 1261.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1989. Justice Marshall extended the time to file a petition for certiorari to and including March 1, 1990, and the petitions were filed on that date. The petitions were granted on May 29, 1990. This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in petitioners' briefs (Rust Br. 1; N.Y. Br. 2). The statutory provisions are set forth in the joint appendix (J.A. 3-12), and the regulatory provisions are set forth in the petition appendix (Pet. App. 1a-8a).

STATEMENT

Congress enacted Title X of the Public Health Service Act to provide federal subsidies for certain types of family planning services. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 6(c), 84 Stat. 1505-1508, 42 U.S.C. 300 to 300a-6a. Section 1001(a) of Title X authorizes the Secretary of Health and Human Services (HHS) to make grants and enter into contracts with public or private nonprofit entities

> to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents).

42 U.S.C. 300(a). Section 1006(a) further provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." 42 U.S.C. 300a-4(a). However, Section 1008 expressly states:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

42 U.S.C. 300a-6. The Conference Report that accompanied the legislation specifically addressed this provision:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees

> have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent.

H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970). As a sponsor of Section 1008 explained, "the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970) (Rep. Dingell). Petitioners challenge the Secretary's regulations implementing Section 1008. See 42 C.F.R. 59.7-59.10.

1. The Secretary's regulations are the product of nearly 20 years of experience in funding Title X family planning projects.[1] The Secretary's initial regulations, which remained largely unchanged from 1971 to 1986, did not provide clear guidance on the scope of Section 1008. They simply required that a grantee's application state that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (1971); 42 C.F.R. 59.5(a)(9) (1972) (J.A. 21). See 45 Fed. Reg. 37,433, 37,437 (1980); 42 C.F.R. 59.5(a)(5) (1986) (J.A. 25-26).[2] During this period, HHS interpreted Title X to prohibit Title X projects from engaging in activities that "in any way promot[e] or encourag[e] abortion as a method of family planning." 53 Fed. Reg. 2922, 2923 (1988) (describing previous HHS guidelines and internal memoranda). See Pet. App. 42a-43a. However, HHS construed Title X to allow, and later required, that Title X projects provide "non-directive" counseling about pregnancy termination, including information about and referral for abortions through the provision of the names,

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[1] The terms "Title X project" and "Title X program" are used by the Secretary interchangeably, and can mean either the "program which is approved by the Secretary for support" or the "coherent assembly of plans, activities and supporting resources contained within an administrative framework." 42 C.F.R. 59.2. While Title X services may be delivered through a family planning clinic, the Title X project may be only one aspect of that clinic. See Rust Br. 3 n.5.

[2] The initial regulations also stated, without reference to abortion, that a grant application must contain provisions for medical and social services "related to family planning." 36 Fed. Reg. 18,466 (1971); 42 C.F.R. 59.5(d) and (e) (1972). See also 45 Fed. Reg. 37,437 (1980); 42 C.F.R. 59.5(b)(1) and (2).

addresses, and telephone numbers of abortion providers. *Id.* at 42a. See 53 Fed. Reg. 2923 (1988).[3]

In 1982, the General Accounting Office (GAO) and HHS's Office of the Inspector General (OIG) completed investigations into alleged misuses of Title X funds. See 53 Fed. Reg. 2923-2924 (1988). Auditing 14 clinics receiving Title X grants, the GAO found that a number of clinics were engaging in various questionable practices, including: (1) providing both family planning services and separately funded, abortion-related activities at a single site; (2) providing family planning counseling that did not present alternatives to abortion; (3) engaging in referral practices that went beyond the HHS referral policy; (4) providing literature that promoted abortion as a back-up method of family planning; and (5) engaging in abortion lobbying activities. See GAO, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification* (Sept. 24, 1982) [hereinafter GAO Report] (J.A. 82-136). See 53 Fed. Reg. 2924 (1988) (describing practices). The GAO concluded that HHS "needs to set forth clear guidance on the scope of abortion restrictions in its title X program regulations and guidelines" and "needs to make its guidance [with respect to abortion advocacy] more specific and consistent." J.A. 82. See also J.A. 88, 110-111, 120-122, 129. For its part, the OIG found, based on audits of 32 Title X projects, that HHS's failure to provide specific program guidance as to the scope of Title X's abortion restriction had created confusion about what activities were proscribed and had led to variations in grantee practices. 53 Fed. Reg. 2924 (1988). Like GAO, the OIG recommended that HHS "give more specific, formalized direction to programs about the extent of prohibition on abortion as a method of family planning." *Id.* at 2923-2924.

[3] See U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 8.6 (1981) (Pet. App. 71a); U.S. Dep't of Health, Educ. & Welfare, *Program Guidelines for Project Grants for Family Planning Services* (1976) (Pet. App. 72a). An HHS internal memorandum from this period explains:

> This office has traditionally taken the view that § 1008 not only prohibits the provision by Title X grantees of abortion as a method of family planning as part of the Title X-supported program, but also prohibits activities which promote or encourage the use of abortion as a method of family planning by the Title X-supported program. Under this view, the provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by § 1008. The provision of "pregnancy counseling" in the sense of encouraging persons to obtain abortions and the provision of transportation to persons to enable them to obtain abortions, on the other hand, are considered to be proscribed by § 1008. The test to be applied, then, appears to be whether the immediate effect of the activity is to encourage or promote the use of abortion as a method of family planning.

Memorandum from Carol C. Conrad, Office of the General Counsel, Dep't of Health, Educ. & Welfare, to Elsie Sullivan, Ass't for Information and Education, Office of Family Planning, BCHS (Apr. 14, 1978) (footnotes omitted) (J.A. 56-57). See Pet. App. 23a, 42a-43a. Petitioners' description of these prior policies as "having no bearing on speech and information between a doctor or counselor and her patient" (Rust Br. 2) is thus clearly wrong.

On September 1, 1987, the Secretary of HHS published a notice of proposed rulemaking to clarify the scope of Section 1008's prohibition. See 52 Fed. Reg. 33,210 (1987). The notice recited the GAO and OIG findings, proposed new regulations responding to those findings, and invited public comment. The resulting comments confirmed the GAO and OIG determinations that the Secretary's past policies had provided ineffective guidance to Title X grantees:

> Many comments argued that the practice o[f] nondirective counseling has been the subject of widespread abuse, with many providers foregoing [*sic*] any balanced discussion of options in favor of pressuring women, particularly teenagers, into obtaining abortions. Numerous comments were received from women who said that they were never presented with any favorable or neutral information on any other option. Many of these commenters specifically mentioned experiences with particular Title X grantees or projects.

53 Fed. Reg. 2924 (1988). See also *id.* at 2924-2925 (citing and quoting comments).

The Secretary accordingly adopted the regulations at issue here to resolve the ongoing uncertainty and confusion concern-

ing the use of Title X funds; to prevent the abuses that the GAO, the OIG, and public comments had documented; and to effectuate more faithfully the underlying congressional policy, embodied in Section 1008, against the use of Title X funds in any way to encourage or promote abortion. See 53 Fed. Reg. 2922 (1988). The regulations first clarify, through a definition of the term "family planning" (42 C.F.R. 59.2), that Congress intended Title X funds to "be used only to support *preventive* family planning services" (H.R. Conf. Rep. No. 1667, *supra*, at 8 (emphasis added)).[4] The regulations then address the three major sources of GAO and OIG concern: (a) abortion counseling and referral (42 C.F.R. 59.8); (b) program integrity (42 C.F.R. 59.9); and (c) abortion advocacy (42 C.F.R. 59.10).

a. *Abortion Counseling and Referral*. The Secretary determined that allowing Title X projects to engage in abortion counseling and referral is inconsistent with Title X's limited function of funding *pre*-pregnancy family planning services and with HHS's longstanding policy of forbidding Title X funded activities that promote or encourage abortion. See 52 Fed. Reg. 33,211 (1987). Section 59.8 of the new regulations accordingly specifies that "[a] Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. 59.8(a)(1). Furthermore, if "a client served

[4] The regulations state:

> "*Family planning*" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services includes [*sic*] preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

42 C.F.R. 59.2.

by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." 42 C.F.R. 59.8(a)(2). In that situation, the Title X project's preventive family planning services are no longer apposite, and the project must direct the client to a prenatal care facility that, unlike a Title X project, can provide pregnancy counseling and obstetric or other pregnancy-related care.[5]

Section 59.8 does not prohibit referrals to prenatal care facilities that also provide abortions, nor does it limit in any way the information or services that a referred client might receive at a prenatal care facility. That facility may provide the woman with counseling about abortion and, indeed, may perform an abortion. Section 59.8 provides, however, that

> [a] Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering"clients to providers who offer abortion as a method of family planning.

42 C.F.R. 59.8(a)(3). The new regulations do not prevent a Title X project from advising its clients that it provides only preventive family planning and infertility services—*i.e.*, that it is concerned with *pre*-pregnancy planning only—and that it does not assist in procuring abortions and abortion services.

b. *Program Integrity*. The Secretary also determined that new requirements were necessary to strengthen HHS's existing

[5] The Title X project must also provide the client "with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." If emergency care is required, however, the project must "refer the client immediately to an appropriate provider of emergency medical services," even when such emergency services normally would involve an abortion. See 42 C.F.R. 59.8(a)(2) and (b)(2).

policy requiring that if a Title X grantee provides abortion services, those services must be "separate and distinct" from a Title X funded project. See 52 Fed. Reg. 33,212 (1987).[6] Section 59.9 therefore provides that a Title X grantee must structure its Title X project "so that it is physically and financially separate" from other parts of a grantee's organization that might provide abortion services. 42 C.F.R. 59.9. Section 59.9 states that the Secretary will make a case-by-case determination of "objective integrity and independence" based upon (but not limited to) factors such as (a) the existence of separate accounting records; (b) the degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) the existence of separate personnel; and (d) the extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent. 42 C.F.R. 59.9.

c. *Abortion Advocacy*. Finally, the Secretary concluded that allowing Title X projects to engage in abortion advocacy is inconsistent with congressional intent and HHS's longstanding policy of forbidding Title X funded activities that promote or encourage abortion. See 52 Fed. Reg. 33,212 (1987). Section 59.10 accordingly states that "[a] Title X project may not encourage, promote or advocate abortion as a method of family planning." 42 C.F.R. 59.10(a).[7] The regulation does not prevent

[6] HHS regulations are directed at achieving the specific and narrow purpose of program integrity and thus do not prevent Title X grant recipients from providing abortion-related services in programs that do not utilize Title X project funds. See note 29, *infra* (explaining the scope of Title X project funds).

[7] The regulation sets forth several specific examples of prohibited advocacy activities: (1) lobbying for the passage of legislation to increase in any way the availability of abortions as a method of family planning; (2) providing speakers to promote the use of abortion as a method of family planning; (3) paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning; (4) using legal action to make abortion available in any way as a method of family planning; and (5) developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning. 42 C.F.R. 59.10(a). The Secretary interprets the statute and the regulations neutrally as barring all forms of abortion-related advocacy, whether in favor of, or opposed to, abortion. With the exception of item 3, these activities were considered to be prohibited under HHS's prior policies. See 53 Fed. Reg. 2942.

a Title X grantee (as distinct from the Title X *project* run by the grantee) from engaging in abortion-related advocacy.

The Secretary explained at length that the three basic conditions embodied in these regulations are necessary to assure that grantees comply with Title X in administering their federally funded Title X projects and to facilitate HHS monitoring of compliance. 53 Fed. Reg. 2923-2943 (1988); 52 Fed. Reg. 33,210-33,213 (1987).

3. Petitioners initiated these consolidated actions against the Secretary to challenge the facial validity of the regulations. Petitioners argued that the regulations are inconsistent with Title X, including Section 1008's restriction on the use of funds "in programs where abortion is a method of family planning" (42 U.S.C. 300a-6), and that the regulations violate the First and Fifth Amendments. The district court granted summary judgment for the Secretary, rejecting all of petitioners' challenges to the regulations. Pet. App. 9a-32a. The court of appeals affirmed. *Id.* at 35a-67a.

The court of appeals first addressed petitioners' contention that Title X does not authorize the regulations in question. Pet. App. 46a-53a. It rejected as "highly strained" petitioners' argument that Section 1008 forbids Title X projects only from performing abortions. *Id.* at 47a. The court explained that a "principal function" of Title X projects is counseling and that a project that counsels clients concerning abortion includes abortion among its "methods of family planning." *Ibid.* Thus, "the natural construction of Section 1008 is that the term 'method of family planning' includes counseling concerning abortion." *Ibid.*

The court found this construction consistent with Title X's legislative history. It observed that petitioners' "contrary view of the legislative history is based entirely on highly generalized

statements about the expansive scope of family planning services" (Pet. App. 48a) that "do not specifically mention counseling concerning abortion as an intended service of Title X projects" and that "surely cannot be read to trump a section of the statute that specifically excludes it" (*id.* at 49a). The court found post-enactment legislative history relied upon by petitioners to be "unenlightening." *Id.* at 49a-50a.

The court also rejected petitioners' argument that the Secretary is bound by prior administrative constructions of the statute. Pet. App. 50a-53a. The court explained that an agency is entitled to "consider varying interpretations and the wisdom of its policy on a continuing basis" (*id.* at 51a). Here, "the Secretary has concluded that prior policy failed to implement the statute" and properly revised that policy through new regulations that "are fully consistent" with the statute. *Ibid.*

The court of appeals likewise rejected petitioners' Fifth Amendment challenge. Pet. App. 53a-56a. The court explained that this Court's recent decision in *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989), "clearly refutes" petitioners' contention that the regulations impermissibly burden the right discerned in *Roe* v. *Wade*, 410 U.S. 113 (1973), to obtain an abortion. Pet. App. 55a. The court of appeals observed that the regulations, which simply prohibit federal funding of abortion counseling, referral, or advocacy, do not place any "affirmative legal barriers to access to abortion." *Ibid.*

Finally, the court of appeals rejected petitioners' contention that the First Amendment prohibits the government from limiting the use of federal funds for abortion counseling, referral, or advocacy. The court explained that, under *Regan* v. *Taxation With Representation* (*TWR*), 461 U.S. 540 (1983), the government has no obligation to subsidize even the "exercise of fundamental rights," including "speech rights." Pet. App. 56a. Moreover, the court noted, the regulations do not "condition receipt of a benefit on the relinquishment of constitutional rights." *Id.* at 57a. Grantees and their employees "remain free to say whatever they wish about abortion outside the Title X project." *Ibid.* The court also held that the regulations "do not facially discriminate on the basis of the viewpoint of the speech

involved." *Id.* at 59a. "Argumentation pro or con as to the advisability of an abortion for a particular woman is neither required nor authorized. * * * Nor do the regulations in any way suggest that Title X funds may be used for public anti-abortion advocacy." *Ibid.*

Judge Cardomone concurred in the majority opinion and wrote a separate opinion. Pet. App. 60a-62a. Judge Kearse dissented in part. *Id.* at 62a-67a. She concluded that the new abortion counseling and referral regulations are arbitrary and capricious and also violate the First and Fifth Amendments.[8]

SUMMARY OF ARGUMENT

Petitioners contend that the Secretary's regulations violate the constitutional rights of Title X participants and are inconsistent with the statute. The court of appeals correctly rejected these arguments. Petitioners' constitutional arguments, disrobed of their rhetoric, rest on the assertion that the government is obligated to subsidize abortion-related services. Their statutory arguments, which the court of appeals aptly described as "highly strained" (Pet. App. 47a), are inconsistent with Title X's language, purpose, and legislative history.

Petitioners incorrectly contend that the Secretary's regulations, which limit Title X projects to the provision of prepregnancy family planning services, burden the qualified right announced in *Roe* v. *Wade*, 410 U.S. 713 (1973), to choose to have an abortion. While under *Roe* the government may not prohibit a woman from choosing to have a first trimester abor-

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[8] The Court of Appeals for the First Circuit has ruled that the Title X regulations are unconstitutional. See *Massachusetts* v. *Secretary of HHS*, 899 F.2d 53 (1st Cir. 1989) (en banc), petition for cert. pending, No. 89-1929 (filed June 8, 1990). But see 899 F.2d at 79 (Torruella, J., dissenting). In addition, the government has appealed two district court decisions that have invalidated the regulations. See *West Virginia Ass'n of Community Health Centers, Inc.* v. *Sullivan*, 737 F. Supp. 929 (S.D. W. Va. 1990) (partially invalidating the regulations on constitutional grounds), appeal pending, No. 90-2366 (4th Cir.); *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (invalidating the regulations on statutory and constitutional grounds), appeal pending, No. 88-2251 (10th Cir.).

tion, this Court has repeatedly held that the government is not obligated to provide the means to exercise any such right. Thus, the government need not finance the provision of information about abortion, whether the information is provided in the form of abortion counseling, referral, or advocacy. Petitioners' contention that the Secretary's regulations require Title X projects to "mislead" their clients is categorically false. The regulations do not permit the project to provide abortion counseling or referral, but they do not prevent the project from informing its clients that the project provides only pre-pregnancy family planning services and that a client must go elsewhere for post-pregnancy counseling and care.

Petitioners are also mistaken in contending that the Secretary's regulations violate the First Amendment rights of Title X participants. The government can selectively fund a program to encourage certain activities that are in the public interest without providing funds to encourage other activities that a private individual wishes to promote. In this case, the government has made a decision to provide federal subsidies for pre-pregnancy family planning and infertility services, but it has decided not to fund activities that "promote or encourage" abortion. The government regulations limit the *Title X project's* activities, but they do not prevent a Title X grant recipient, its employees, or its clients from advocating and pursuing other objectives outside of the Title X project itself.

Finally, petitioners' contention that Title X does not authorize the Secretary's regulations is without merit. As the court of appeals explained, the Secretary's regulations are consistent with the language and history of Title X, which make clear that federal funding is not available for programs "where abortion is a method of family planning." § 1008, 42 U.S.C. 300a-6. HHS has consistently taken the position that Title X funds are not available to fund projects that "promote or encourage" abortion. The Secretary's regulations, which clarify the scope of this restriction, are reasonable and necessary to assure that Title X funds are applied only to those activities that Congress wished to promote.

ARGUMENT

Petitioners challenge the Secretary's Title X regulations on both constitutional and statutory grounds. Since petitioners place greatest emphasis on their constitutional arguments (see Rust Br. 13-39, N.Y. Br. 31-49), we address those contentions first and show, as the court of appeals held, that the regulations do not impermissibly burden the Fifth Amendment rights of Title X project clients or the First Amendment rights of Title X project participants. We then demonstrate, as the court of appeals also held, that the regulations properly implement the statute.

I. THE REGULATIONS DO NOT VIOLATE THE FIFTH AMENDMENT

Petitioners argue that the Secretary's regulations impermissibly burden the qualified right discerned in *Roe* v. *Wade*, 410 U.S. 113 (1973), to choose to have an abortion. See Rust Br. 31-36; N.Y. Br. 47-49. We continue to believe that *Roe* was wrongly decided and should be overruled. As more fully explained in our briefs, filed as amicus curiae, in *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990); *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); and *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983), the Court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution. If *Roe* is overturned, petitioners' contention that the Title X regulations burden the right announced in *Roe* falls with it. But even under *Roe*'s strictures, the Title X regulations at issue do not violate due process.

This Court has repeatedly recognized that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Webster*, 109 S. Ct. at 3051 (quoting *DeShaney* v. *Winnebago County Dep't of Social Services*, 109 S. Ct. 998, 1003 (1989)). Thus, while under *Roe* the government may not prohibit a woman, during the first trimester, from choosing to have an abortion, the government is not obligated

to provide the means to exercise any such right. See *Webster*, 109 S. Ct. at 3051-3053; *Harris* v. *McRae*, 448 U.S. 297, 312-318 (1980); *Poelker* v. *Doe*, 432 U.S. 519, 521 (1977); *Maher* v. *Roe*, 432 U.S. 464, 473-474 (1977). Indeed, as this Court has expressly stated, the government "may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.' " *Webster*, 109 S. Ct. at 3052 (quoting *Maher*, 432 U.S. at 474). *Webster* made it clear that

> the State's decision * * * to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *McRae*, 448 U.S., at 315. Just as Congress' refusal to fund abortions in *McRae* left "an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all," *id.* at 317, Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.

109 S. Ct. at 3052 (parallel citations omitted).

This Court's decisions in *Webster*, *McRae*, *Poelker*, and *Maher* establish that the government need not finance abortions or provide public facilities and personnel for their performance. By the same token, the government need not finance the provision of information *about* abortion, whether that information is provided in the form of counseling, referral, or advocacy. Even assuming what we do not concede, what has not been shown, and what is hardly intuitive—that a woman may encounter difficulty in obtaining abortion information if Title X projects do not provide abortion counseling, referral, or advocacy—that difficulty is not a government-created obstacle. The woman is in precisely the same position she would occupy if Congress had not enacted Title X. See *McRae*, 448 U.S. at 316. She "suffers no disadvantage as a consequence" of the Secretary's Title X regulations, because "she continues as before to be dependent on private sources for the service she desires." *Maher*, 432 U.S. at 474. The government's choice not to have its funds spent on

abortion counseling, referral, or advocacy is simply not an infringement on any right to engage in those activities. As this Court explained in *McRae*, 448 U.S. at 317 n.19, "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." [9]

Petitioners contend, however, that the regulations place an obstacle in the path of a woman's choice to have an abortion by requiring Title X projects to "misinform" and "mislead" their clients concerning the scope of available medical services. See Rust Br. 31-32, 34, 36; N.Y. Br. 48. Not so. The regulations state that a Title X project can provide only certain types of family planning services, but they in no wise prevent the project from acknowledging that fact. To the contrary, the Title X regulations leave a participating project and its employees entirely free to advise clients that the project provides a service but only a limited service: it provides only pre-pregnancy services, and clients should go elsewhere if they desire *either* abortion-related counseling and services *or* obstetric care in carrying the child to term. Similarly, a Title X project is entirely free to advise those who are pregnant that the project's referral list of prenatal care facilities (see 42 C.F.R. 59.8(a)(2)) includes providers that promote the welfare of the mother and the unborn child and does not include entities whose principal business is the provision of abortions. Thus, the regulations do not require Title X projects to deceive their clients.[10] Petitioners' contention

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[9] Indeed, the Secretary's Title X regulations have far less practical effect than the state action upheld in *Webster*, which prevented women from obtaining abortions at a hospital "where, in 1985, 97 percent of all Missouri hospital abortions at 16 weeks or later were performed." *Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., dissenting). The dissenting opinion in *Webster* concluded that *McRae* and *Maher* were inapposite because the State, in the dissent's view, "has taken affirmative steps to assure that abortions are not performed by *private* physicians in *private* institutions." *Ibid.* That certainly is not the case here.

[10] There is no evidence, or reason to believe, that Title X projects will fail to acknowledge the limited scope of their services. And there is no constitutional requirement that the regulations explicitly guard against the unlikely prospect that Title X projects will fail to provide that information. Cf. *Bowen* v. *Kendrick*, 487 U.S. 589, 615 (1988) ("we do not think that the absence of an ex-

that the regulations require "[m]andatory distortion of relevant medical information" (Rust Br. 31-32) is categorically false.[11]

Petitioners are also incorrect in asserting that the regulations intrude in an unconstitutional manner on the woman's relationship with her physician. See Rust Br. 32-33; N.Y. Br. 47, 48-49. Petitioners rely on *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) and *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983), which invalidated laws designed to regulate the information that *any* physician practicing in a State could provide to *any* patient concerning abortion-related matters.[12] The Title

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press limitation on the use of federal funds for religious purposes [in the Adolescent Family Life Act] means that the statute, on its face, has the primary effect of advancing religion"). In any event, the regulations are not subject to facial constitutional attack based on the anticipation of an implausible event. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (law or regulation cannot be held unconstitutional on its face unless it is incapable of valid application); *Roemer* v. *Maryland Board of Public Works*, 426 U.S. 736, 761 (1976) ("It has not been this Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds.").

[11] Ironically, petitioners use selective placement of ellipses to support their claim that the regulations require Title X projects to mislead their clients. They contend that a "negative message about abortion will be all that is conveyed" because the regulations require referral to facilities that "promote the 'welfare of . . . [the] unborn child,' § 59.8(a) (2), while providing 'information necessary to protect the health of . . . [the] unborn child,' *id.*" Rust Br. 16 (ellipses in original). The regulations require that the referral list include facilities that promote the welfare of *both* the "mother and unborn child." See 42 C.F.R. 59.8(a) (2). Presumably, a woman in need of pregnancy counseling has not decided whether or not to have an abortion. During this interim period of indecision, it is completely reasonable that the health care professional's referral should preserve both the mother's health and her option to carry the child to term.

[12] See *Thornburgh*, 476 U.S. at 758-771 (invalidating informed consent requirements applicable to all physicians practicing in the State); *Akron*, 462 U.S. at 442-449 (invalidating affirmative disclosure obligations placed upon all physicians practicing in the State). As petitioners acknowledge (N.Y. Br. 32 n.28), "[m]uch, if not most counseling of pregnant women in Title X clinics is performed by health professionals other than physicians." See also J.A. 114

X regulations, by contrast, affect only those women who elect to participate in a federally subsidized program designed to provide only pre-pregnancy family planning and infertility services. The regulations do not prevent a woman from obtaining abortion information; she simply must seek it from a source other than a Title X project. As this Court has stated, "the critical factor is whether she receives the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." See *Akron*, 462 U.S. at 448. Thus, Title X and the Secretary's regulations do not conflict with *Akron* and *Thornburgh*. Rather, they merely define the scope of the services that a federally subsidized Title X health care professional may provide in the context of a specific, limited program.

Nor do the regulations violate due process by unduly delaying the exercise of rights under *Roe*. See Rust Br. 34; N.Y. Br. 48. No one is required to visit a Title X project before seeking an abortion or abortion-related counseling; any "delay" occasioned by such a visit is caused by the volitional act of the individual rather than the operation of law.[13] The client can leave at once

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(GAO Report). As we explain (pp. 24-27, *infra*), the Title X regulations do not violate the First Amendment rights of those health care professionals.

[13] Compare *Ohio* v. *Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2981 (1990) (holding that a State may prohibit the performance of an abortion on an unmarried, unemancipated minor unless the physician provides timely notice to one of the minor's parents or a juvenile court issues an order authorizing a minor to consent, which could take up to 22 days); *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990) (holding that a State may prohibit the performance of an abortion on a minor until at least 48 hours after both of her parents have been notified, provided that the minor also may obtain a judicial "bypass" around the notice requirement); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 491 n.16 (1983) (holding that a state parental consent statute containing a judicial bypass procedure that could require 17 calendar days plus a sufficient time for deliberation and decisionmaking at both the trial and appellate levels did not deny a woman the "effective opportunity for an abortion" (see *Ohio*, 110 S. Ct. at 2981)). Any delay here would not exceed the delay that a woman would experience if she mistakenly sought an abortion at a Missouri public hospital (see *Webster*, 109 S. Ct. 3040). The minimal delay that a woman might encounter is necessary to achieve the government's legitimate interest in assuring that Title X projects do not

upon learning that the Title X project does not provide abortion-related counseling or referral, if that is her wish, and immediately seek those services elsewhere. Thus, the regulations do not deny, or even meaningfully delay, "the effective opportunity for an abortion." See *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 491 n.16 (1983). Indeed, the delay generally should be no greater than the delay that would result if, as in the past, the Title X project provided non-directive abortion counseling but required the client to go elsewhere to obtain an abortion. See 53 Fed. Reg. at 2937-2938. Cf. *Hodgson* v. *Minnesota*, 110 U.S. 2926, 2944 (1990) (opinion of Justice Stevens) (a statutory "48-hour waiting period may run concurrently with the time necessary to make an appointment for the procedure, thus resulting in little or no delay").[14]

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become associated with controversial family planning techniques, such as abortion, that might jeopardize public support for *any* family planning services. See note 24, *infra*. Moreover, the woman, through her own efforts, could minimize or eliminate the delay. Compare *Akron*, 462 U.S. at 450-451 (invalidating, as "arbitrary and inflexible," a mandatory 24-hour waiting period for abortions).

[14] For related reasons, petitioners err in contending that the new regulations will unduly increase the cost of a woman's exercise of her rights. See Rust Br. 34-35; N.Y. Br. 48 n.54. An individual who does not want the limited services offered by a Title X project can leave before incurring any costs. In addition, the sliding-scale fee schedules that most Title X programs use, which entitle indigent women generally to receive Title X services without charge (see 42 C.F.R. 59.5(a) (6)-(8)), and the existence of other federally funded programs (including but not limited to Medicaid) further diminish the possibility that the cost of Title X services would ever increase the cost of obtaining abortion-related services to constitutionally significant levels. See *Webster*, 109 S. Ct. at 3052 (rejecting argument that state law forbidding use of public facilities or employees for performing abortions would unconstitutionally "increase the cost of obtaining an abortion"); *Planned Parenthood Ass'n*, 462 U.S. at 490 (upholding state requirement that a pathologist examine tissue samples after every abortion, at the estimated cost of $19.40 per abortion, because "in light of the substantial benefits that a pathologist's examination can have, this small cost clearly is justified").

II. THE REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioners further argue that the regulations violate the "free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients." Rust Br. 13; see N.Y. Br. 32. Petitioners specifically contend that the regulations impermissibly "impose viewpoint-discriminatory conditions on government subsidies" and "penaliz[e] speech funded with non-Title X monies." Rust Br. 14, 24; see N.Y. Br. 32, 41, 42. Petitioners' arguments are incorrect and reflect a mistaken understanding of the First Amendment's application to the Title X program.

1. This Court has repeatedly rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan* v. *Taxation With Representation* (*TWR*), 461 U.S. 540, 546 (1983) (quoting *Cammarano* v. *United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)). See also *Lyng* v. *International Union*, 485 U.S. 360, 369 (1988); *Buckley* v. *Valeo*, 424 U.S. 1, 93-95 (1976). Thus, the government can selectively fund a program that "encourage[s] actions deemed to be in the public interest" (*Maher*, 432 U.S. at 476) without providing funding to encourage other actions that a private individual wishes to promote. See *id.* at 476-477.[15] The Court's reasoning here closely follows its reasoning in the Fifth Amendment context (pp. 13-15, *supra*):

> "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation."

TWR, 461 U.S. at 549-550 (brackets and ellipsis in original, quoting *McRae*, 448 U.S. at 316).[16]

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[15] As Judge Cudahy succinctly stated that matter, the Constitution "does not engraft an 'equal time' requirement onto the dispensation of state funds for the encouragement of matters reflecting a legitimate state interest." *Planned Parenthood Ass'n* v. *Kempiners*, 700 F.2d 1115, 1128 (7th Cir. 1983) (opinion of Cudahy, J.).

[16] See also, *e.g.*, *Maher*, 432 U.S. at 476 ("Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's

The Title X regulations are consistent with these principles. The government has made a decision to provide federal subsidies for a concededly valid purpose: the promotion of pre-pregnancy family planning and infertility services for low-income individuals. But the government has decided against funding actions to "promote or encourage" abortion, whether those actions take the form of abortion counseling, referral, or advocacy. The government's decision against funding the exercise of what might amount to "speech" concerning abortion imposes no affirmative obstacle on the person who is free to engage in such speech without federal funding, and therefore does not infringe any constitutional right. See *TWR*, 461 U.S. at 549.

Petitioners argue that the Court's reasoning in *TWR*, *McRae*, and *Maher* is inapposite because the Title X regulations subject Title X grant recipients, their employees, and their clients to discriminatory treatment "on the basis of viewpoint." Rust Br. 15; N.Y. Br. 32. They contend—based on this Court's decisions in *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221 (1987), and *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), and dicta in *TWR*, 461 U.S. at 548—that the regulations are accordingly unlawful. Rust Br. 17; see N.Y Br. 38-39. Petitioners are mistaken as to both their premise and the import of those cases. The regulations governing how federal money is spent do not place impermissible burdens on the expressive conduct of grantees, employees, or clients.

a. *Grant Recipients*. Petitioners are manifestly wrong in suggesting that the Title X regulations restrict the speech of Title X grant recipients. A Title X *grantee* and a Title X *project* are two distinct entities. The grantee, which is normally a health care organization (Rust Br. 13), may receive funds from a variety of sources for a variety of purposes. See Rust Br. 3 n.5.

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power to encourage actions deemed to be in the public interest is necessarily far broader."). Cf. *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) ("the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government") (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

However, it receives Title X funds for the specific and limited purpose of establishing and operating a Title X project (§ 1001(a), 42 U.S.C. 300(a)). The Secretary's regulations govern the scope of the *project's* activities.[17] The grantee, however, can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy. The grantee is simply required to conduct those activities through programs that are separate and independent from the project that receives federal funds. See 42 C.F.R. 59.9.

The Court's decisions in *Arkansas Writers' Project* and *FCC*, and the dicta in *TWR*, all involve restrictions imposed on the *recipient* of the subsidy rather than on the specific subsidized *service*. Those are two quite different forms of restrictions.[18] The Court's decision in *FCC* illustrates the importance of the distinction. In *FCC*, the Court invalidated a federal law providing that noncommercial television and radio stations that re-

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[17] See 42 C.F.R. 59.8 ("A *Title X project* may not provide counseling concerning the use of abortion as a method of family planning.") (emphasis added); 42 C.F.R. 59.9 ("A *Title X project* must be organized so that it is physically and financially separate" from prohibited activities.) (emphasis added); 42 C.F.R. 59.10 ("A *Title X project* may not encourage, promote, or advocate abortion as a method of family planning.") (emphasis added).

[18] *Arkansas Writers' Project*, which involves the special problem of "a discriminatory tax on the press" (481 U.S. at 227), obviously has little relevance here. See *id.* at 228 ("selective taxation of the press • • • poses a particular danger of abuse by the State"). In any event, it involves a situation where the State provided publishers with a subsidy (a sales tax exemption) based on the general identity of their publications' audience (*e.g.*, religious, professional, or trade magazines) rather than a subsidy to produce a particular article. *Id.* at 223-225. As we explain in the text, *FCC* is likewise distinguishable; the government restricted a subsidized broadcaster's expression rather than the content of a particular subsidized broadcast. 468 U.S. at 400. Similarly, the Court's statement in *TWR* that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas' " (461 U.S. at 548) describes *Speiser* v. *Randall*, 357 U.S. 513 (1958), where California denied a tax exemption to persons who refused to sign a loyalty oath. There as well the government imposed a limitation directly on the grant recipient's freedom of expression rather than on the content of a particular subsidized product or service.

ceive federal grants may not "engage in editorializing." 468 U.S. at 374-402. In that case, the statute imposed a "content-based" restriction directly on the media grantee. In this case, by contrast, the government restrictions are not imposed on the grantee, but rather on the specific Title X project that the grantee produces. The facts in *FCC* would bear some similarity to the present case if the government had offered the broadcaster a federal grant to produce a specific broadcast *program*, subject to certain content-based conditions. But under *FCC*'s reasoning, such grants would be permissible because the station would be "able to segregate its activities according to the source of its funding." 468 U.S. at 400. Indeed, part of the very purpose of the regulations at issue here is to implement such segregation.[19]

More generally, the government is entitled to participate in public discourse. See *Block* v. *Meese*, 793 F.2d 1303, 1312-1314 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986). Indeed, petitioners acknowledge as much. Rust Br. 23; N.Y. Br. 39 n.40. For example, we submit that the government could offer a television station a grant to produce a documentary that discusses family planning techniques but does not provide abortion counseling, or otherwise promote, encourage, or advocate abortion. In that circumstance, the government is acting as a "participant in the marketplace of ideas" rather than as "a regulator of expression." The government's decision to enter the marketplace by "contracting out" the production of that message does not violate the First Amendment rights of the grantee who voluntarily decides to produce the program.[20] If the First Amendment allows the government to fund that broadcast program, which involves expressive conduct, it cer-

[19] The Court specifically explained that if the government permitted stations "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of [*TWR*]." 468 U.S. at 400.

[20] See L. Tribe, *American Constitutional Law* 783 (2d ed. 1988) ("When government adds its own voice to the dialogue, and perhaps also when it subsidizes the voices of its surrogates, it is not subject to the usual form or level of first amendment scrutiny.").

tainly must permit the government to fund the services themselves.[21]

Indeed, the Secretary's regulations can be said to restrict a grant recipient's freedom of expression in only the most attenuated way: grantees must conduct any abortion counseling and advocacy through programs that are separate and distinct from the federally funded program. See 42 C.F.R. 59.9. That restriction, which is designed to assure "program integrity" (*ibid.*), plainly is permissible. This Court has recognized that the government's power to spend government funds for public purposes includes an ancillary power to assure that those funds are properly applied to the prescribed use.[22] The Secretary's program integrity regulation, which states that the "Title X project must be organized so that it is physically and financially separate" from prohibited activities (43 C.F.R. 59.9(a)), is a reasonable condition on the receipt of Title X funds. The regulation is specifically designed to assure that Title X grantees do not mix federally subsidized activities with non-subsidized activities in a manner that results in, or creates the appearance of, the government funding abortion as a method of family planning. The regulation, which is applied on a case-by-case basis (see p. 8, *supra*), is narrowly tailored to assure that Title X

[21] Contrary to petitioners' suggestion, the Secretary's regulations are content-based rather than viewpoint-based. As the court of appeals explained, they prohibit all discussion of abortion "pro or con." Pet. App. 59a. Even if the regulations did impose a viewpoint restriction, the analysis would be much the same. The government is entitled to have a viewpoint when it participates in public discourse. Moreover, as this Court has already held, it "may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment through the allocation of public funds.' " *Webster*, 109 S. Ct. 3052 (quoting *Maher*, 432 U.S. at 474).

[22] See *South Dakota* v. *Dole*, 483 U.S. 203, 207-209 (1987) (government may withhold federal highway funds from States that fail to raise the drinking age to 21 because that failure relates to highway safety and, hence, the proper use of the federal subsidy); *Buckley* v. *Valeo*, 424 U.S. 1, 99 (1976) (government's power to restrict use of public campaign funds includes the power to limit private campaign expenditures of those who receive public funds); see also *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958).

funds are expended for the intended government purposes.[23] The restriction bears a rational and close relationship to the purpose of the subsidy.[24]

b. *Employees of Grant Recipients*. Similarly, petitioners are wrong in arguing that the Secretary's regulations abridge the "free speech" rights of the grantee's "staff" (Rust Br. 13). The grantee may employ persons to carry out the Title X project's

[23] Moreover, because the program integrity regulation is applied on a flexible, case-by-case basis and takes into account a number of relevant facts and circumstances (see 42 C.F.R. 59.9), a facial challenge is particularly inappropriate. Petitioners' primary complaint—that the program integrity requirements will increase the grantees' costs in providing nonsubsidized services (Rust Br. 28-29; N.Y. Br. 42-43)—seems an especially unsuitable ground for a facial challenge. Indeed, that argument, on its face, suggests that petitioners are improperly using Title X monies to subsidize *non-Title X* services.

[24] See L. Tribe, *supra*, at 783 ("government's power to set the terms on which it offers a subsidy must be thought to include at least some power to restrict not only how that very subsidy is used but also certain other activities of the subsidized person or entity when those other activities bear a close enough relationship to use of the subsidy"). The government has a legitimate interest in assuring that Title X projects do not become associated with controversial family planning techniques that might jeopardize public support for *any* family planning services. Cf. *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809 ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"). Thus, the government may not only choose to include or exclude particular family planning methods, it may determine the necessary degree of separation between subsidized and unsubsidized activities. The line drawn will leave some parties dissatisfied, but that is an inevitable consequence of a program that funds some activities but not others. The fact remains that the "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *McRae*, 448 U.S. at 317 n.19; *Maher*, 432 U.S. at 474-475 n.8. For example, the government has determined that Title X projects must counsel clients concerning various methods of birth control. As a result, Catholic organizations have largely refused to participate in the Title X program. No one suggests, however, that Title X therefore violates the First Amendment. Catholic organizations are still free to counsel against the use of any artificial method of birth control, and they are not "penalized" in any respect for doing so. They are simply unable to take part in a government-sponsored program with a different purpose. Like petitioners, they have no right to insist that the government fund the activities they wish to pursue simply because the government has decided to fund other activities.

functions, and those persons who voluntarily accept employment as Title X project personnel must perform duties in accordance with the Title X project's objects and purposes. The First Amendment does not entitle Title X project personnel to use the federal funds to defeat or compromise the objectives of the federally-funded project. The Secretary's regulations provide that the Title X project (and hence employees implementing the project's objectives) may not engage in abortion counseling and advocacy activities. The employees remain free, however, to pursue abortion-related activities, whether favoring or opposing abortion, when they are not acting under the auspices of the Title X project. 42 C.F.R. 59.10(b)(6) and (7). See Pet. App. 57a.

The Court's decision in *FCC* illustrates again the flaws in petitioners' challenge. As we explained above, the government's funding of a health care organization's Title X project would be analogous, for First Amendment purposes, to the government's funding of a television station's broadcast program that describes, in documentary form, pre-pregnancy preventive family planning techniques. The grant recipient's employees that implement the Title X project stand in the same shoes, for First Amendment purposes, as the broadcaster's employees who direct and prepare the documentary. It would be a curious extension of First Amendment principles to hold that the government's specification of the content of a federally funded documentary program violates the First Amendment rights of the program director or the health care professionals who choose to appear in the program. Yet, that is exactly what petitioners argue here.[25]

[25] Petitioners maintain that different rules should apply in the case of health care professionals because government "manipulation" of the "doctor-patient dialogue is particularly antithetical to the First Amendment." Rust Br. 20; see N.Y. Br. 32-34. Putting petitioners' rhetoric to one side, the health care professional's dialogue is restricted in only one limited sense. He is hired to provide only pre-pregnancy family planning and infertility services and must refer the client to *other* qualified health care professionals for post-pregnancy services. As the Secretary explained in promulgating the regulations, the referral of a client to another health care professional does not violate accepted

Simply put, the grant recipient, by accepting the federal subsidy, is obligated to comply with the conditions of the federal grant. The grant recipient's employees, as a matter of the employment relationship, are obligated to comply with the grant recipient's directions. Thus, any limitation on the employees' freedom of expression arises from their voluntary decision to enter a particular employment relationship. The government's federally funded grant may have enabled the grant recipient to offer job options that some may not wish to exercise, but it has not violated any First Amendment rights. See *TWR*, 461 U.S. at 549-550 (the government need not remove "obstacles in the path of a [person's] exercise of . . . freedom of [speech]" that are "not of its own creation" (brackets and ellipsis in original)).[26]

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medical ethics. See 53 Fed. Reg. 2932-2933 (1988). See also Br. of the Ass'n of American Physicians and Surgeons as Amicus Curiae in Support of Respondent; Br. of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondent.

[26] Obviously, a private health care organization's employees cannot raise a First Amendment challenge to thwart an employer's attempt to convey (or not convey) a particular message. See *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976) ("the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state"). The government, like other "participants in the marketplace of ideas," is also entitled to convey its message. Thus, even if this Court were to hold that the grant recipient's employees have a First Amendment claim against the federal government in this context, it should be fashioned in light of the government's right to convey, or not convey, a particular message. It is, of course, well settled that the government may condition government employment on the employee's willingness to abide by a wide variety of rules, including rules governing expressive activity, that are reasonably related to the government's interest as an employer. See, *e.g.*, *CSC* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act). See also, *e.g.*, *O'Connor* v. *Ortega*, 480 U.S. 709, 723 (1987) (government may search employees' property under various circumstances in which searches of private citizens would not be allowed); *Connick* v. *Myers*, 461 U.S. 138, 147 (1983) (government employees may be fired for speech of merely private concern under various circumstances); *Kelley* v. *Johnson*, 425 U.S. 238, 247 (1976) (government may bar policemen from wearing long hair); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 616-617 (1973) (state law restriction on partisan political activities); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947) (Hatch Act). Thus, while a government employee has a qualified right to participate, like other citizens, in public discourse, the First Amendment does not protect a public employee when he "speaks not as a citizen upon a matter of public concern, but instead as an employee upon matters only of personal interest." *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). By the same token, when the government has provided federal funding to furnish a particular service, the employee hired to render that service has no First Amendment right to ignore the government's instructions, and certainly no First Amendment right to use the federal funds to provide services the government has elected not to provide.

In short, Title X project personnel do not have a First Amendment right to use Title X project resources for purposes that are inconsistent with Title X project objectives. They remain free, however, to pursue abortion-related activities, whether favoring or opposing abortion, on their time and with their own resources. The Secretary's regulations, which govern only the scope of *Title X project* activities (see note 17, *supra*), do not in any way restrict the activities of those persons acting as private individuals.

c. *Clients*. Petitioners are also incorrect in arguing that the Secretary's regulations abridge the "free speech" rights of Title X project clients. As we have explained (pp. 13-18, *supra*), the government's decision to deny funding for abortion counseling, referral, and advocacy does not violate a woman's exercise of rights under *Roe*. See *McRae*, 448 U.S. at 316. By the same token, it does not violate any conceivable First Amendment right. Again, the Court's decision in *FCC* demonstrates the fallacy in petitioner's reasoning. In our television analogy, a Title X project client occupies the same position, for First Amendment purposes, as the audience for the government-funded documentary. Petitioners argue, in essence, that the government's funding of a program that provides family planning information—but only on pre-pregnancy preventive techniques—violates the audience's First Amendment rights, because the audience wants to see a *different* program—one that includes *post*-pregnancy information. That extravagant contention finds no support in First Amendment law. To pursue the analogy, the person who wants to see that different program need only turn the channel. The government is not required to fund all the

possible programs an audience may wish to watch before it may fund any program.

As we observed above (p. 22, *supra*), petitioners acknowledge that the government may participate in the "marketplace of ideas." Rust Br. 23; N.Y. Br. 39 n.40. Having conceded that, petitioners cannot reasonably argue that the First Amendment prevents the government from providing family planning information.[27] Similarly, petitioners cannot reasonably contend that the First Amendment prevents the government from limiting the subject of its "program" to pre-pregnancy family planning techniques.[28] Petitioners do not contend that the government is conveying false information, and they are plainly incorrect in suggesting that the information is misleading. Their objection is simply that the government has failed to fund the message *they*

[27] See, *e.g.*, *First National Bank* v. *Belotti*, 435 U.S. 765, 777 (1978) ("[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source"). Particularly troublesome are petitioners' contentions that government speech is pernicious because clients might be influenced by what they think the government "disapproves" (N.Y. Br. 39) or that it might "distort the marketplace of ideas" (*id.* at 39 n.40). This analysis is at war with the basic values enshrined in our system of free expression. See Schauer, *Is Government Speech a Problem?*, 35 Stan. L. Rev. 373, 381-382 (1983) ("The assumption that government speech is likely to have a highly distorting effect on the trade in ideas is an assumption that goes not to the question of government speech but instead to the roots of the very idea of freedom of speech. * * * [A]s a long run strategy, we are willing to place some faith in the collective judgment of the people, and if this is the case, there seems to be no reason to assume that such collective judgment cannot appreciate government speech for what it is, in light of its source.").

[28] The First Amendment does not forbid the government from limiting a federal program to the purpose for which it was intended, as this Court's "non-public forum" cases make clear. See *Cornelius*, 473 U.S. at 806 (government entitled to limit federal fund-raising program to groups that serve program's goals); see also *United States* v. *Kokinda*, 110 S. Ct. 3115 (1990); *Perry Educ. Ass'n.* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Madison School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Cf. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 Cal. L. Rev. 1104, 1111 (1979) (First Amendment does not bar government from "supporting contemporary art over traditional art, ballet over modern dance, and family-oriented entertainment over adult entertainment").

wish to hear—an objection more properly addressed to the political branches responsible for funding decisions.

Ultimately, petitioners are left to argue that "the Title X program is often the only 'marketplace' in which low-income women can obtain medical counsel and information." Rust Br. 23-24. In effect, they contend that the government has "monopolized" the market for information about the availability of abortion. *Id.* at 24. The government, however, has expressly refused to enter that market: the regulations, by their terms, specifically provide that Title X projects "may not provide counseling concerning the use of abortion as a method of family planning." 42 C.F.R. 59.8(a)(1). Moreover, if it is a woman's income that constrains her from obtaining abortion information, we have simply returned to where we began: this Court has repeatedly rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *TWR*, 461 U.S. at 546.

2. Petitioners also contend that the Secretary's regulations "violate the First Amendment by penalizing speech funded with non-Title X monies" (Rust Br. 24). They argue that since Title X requires that grant recipients contribute to the financing of Title X projects through the use of "matching funds" and grant-related income, the government restrictions on abortion counseling and advocacy "penalize" privately funded speech. See *id.* at 24-31; N.Y. Br. 42-46.[29]

[29] Title X project funds are defined to include "grant funds, grant-related income or matching funds." See 42 C.F.R. 59.2. Grant funds are those provided by the government; matching funds are the funds that must be supplied to the project by the grantee to cover the balance of estimated expenses. 42 C.F.R. 59.11(b). Grant-related income describes funds generated by the Title X project through, for example, patient charges or reimbursement from collateral sources. The terms of the grant specify how grant-related income may be used. The Secretary may specify that these funds be returned to the government, be applied as matching funds, or be used to expand the Title X project. See, *e.g.*, 45 C.F.R. 74.42(c)-(e). The grant recipient makes the decision whether to apply for federal funds and—subject to Title X and the Secretary's regulations—what activities to include in its application. Once a grant award is made, the federal funds support the allowable costs, on a proportional basis,

Petitioners' argument suffers from the same flaw that infects their previous assertions: the Secretary's regulations do not restrict the grant recipient's freedom of expression, they instead restrict the content of a specific, federally subsidized project. Our television analogy again is instructive. The government does not infringe the First Amendment rights of a television station by offering to subsidize a particular broadcast program even if the government conditions its subsidy on the station contributing matching or program-generated funds. The reason is self-evident: if the station objects to the use of its funds, then it can decline to produce the program. Similarly, if petitioners object to the use of their funds in a Title X project – for whatever reason – they can simply decline the subsidy.[30]

These principles are not novel. The government "may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' " *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). The government frequently requires, as was the case in *South Dakota*, that

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of all of the authorized activities described by the grantee in its application. There is no clear differentiation between federal and non-federal funds within a Title X project. See 45 C.F.R. 74.170.

[30] As we have explained (see note 18, *supra*), the Court's *FCC* decision dealt with a fundamentally different situation. The government offered grants to television stations on the condition that the grant recipient – the television station – would engage in no editorializing. Thus, the station would be "barred absolutely from all editorializing" because it "is not able to segregate its activities according to its source of funding." 468 U.S. at 400. Here, by contrast, the grant recipient suffers no limitation on *its* freedom of expression; it simply has an opportunity to operate a federally subsidized project under the conditions – both financial and programmatic – that the government has attached to the use of federal funds. Indeed, the regulations specifically contemplate the possibility that some Title X recipients will engage in abortion-related activities by means of complying with the program integrity requirements. 42 C.F.R. 59.9.

the recipient contribute matching funds (see 23 U.S.C. 123).[31] This Court has never suggested that a grant recipient who contributes matching funds is entitled to dictate the objectives or purposes of the federal program, or that the recipient is entitled to apply his contribution to the program to his personal objectives.[32] Indeed, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court held, in response to First and Fifth Amendment challenges, that the government's power to restrict the use of public campaign funds includes the power to limit private campaign expenditures of those who receive public funds. See *id.* at 92-93, 99. The government's condition does not "penalize" speech in that context because the candidate has the option to decline the subsidy.[33] So too here: grant recipients can choose between accepting Title X funds – subject to the government's conditions that they provide matching funds and forgo abortion counseling or advocacy in the project – or financing their own unsubsidized program.[34] The First Amendment does not

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[31] The Court recently rejected an Establishment Clause challenge to a law that, like the Title X program, has a matching fund requirement and that restricts the awarding of grants for adolescent pregnancy programs to programs that do not provide abortions or abortion counseling or referral unless that adolescent and her parents request such referral. See *Bowen* v. *Kendrick*, 487 U.S. 589, 593-597 (1988) (describing the Adolescent Family Life Act, 42 U.S.C. 300z *et seq.*).

[32] The federal government generally provides the dominant share of funding, and thus has a strong interest in dictating program functions and objectives. For example, in the case of the Title X program, the federal government generally provides grants covering at least 90% of the estimated project costs. See 42 C.F.R. 59.11(b). Compare *FCC*, 468 U.S. at 400 ("a noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing").

[33] See L. Tribe, *supra*, at 783 ("it is understandable that the Court should have concluded, in *Buckley* v. *Valeo*, that a candidate may be forced to choose between running a campaign funded exclusively with a public grant and running a campaign funded solely with unlimited private spending").

[34] The government can attract matching funds because the programs it designs provide benefits that the participants are willing to support. Here, as elsewhere, an organization is free to choose not to participate in programs that do not serve its particular interests. See note 24, *supra*. See also *South Dakota*, 483 U.S. at 211 ("Till now the law has been guided by a robust common sense

prohibit the government from offering that choice.[35]

III. TITLE X AUTHORIZES THE SECRETARY'S REGULATIONS

Petitioners contend that this Court should invalidate the Secretary's regulations because "they are neither required nor expressly authorized by the language, structure, or history of Title X." Rust Br. 37. See N.Y. Br. 10-31. The court of appeals (like the district court) correctly rejected that argument, holding that "the language and history of Title X are fully consistent with the regulations challenged in the instant case." Pet. App. 51a. The other court of appeals that has addressed the question, the First Circuit, is largely in agreement with that determination.[36] We will show that the court below is correct, addressing,

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which assumes the freedom of the will as a working hypothesis in the solution of its problems." (quoting *Stewart Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).

[35] Petitioners also contend that the Secretary's regulations should be invalidated to avoid encountering the constitutional issues that petitioners have raised. N.Y. Br. 31; Rust Br. 37-38. They rely on this Court's decisions in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988), and *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), which hold that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." 440 U.S. at 500. But as we have shown, Title X, as the Secretary has interpreted and applied it, does not give rise to "serious constitutional questions." *Id.* at 501. Contrary to petitioners' suggestion (Rust Br. 38 n.69), the mere fact that several lower courts have held a regulation unconstitutional does not mean that this Court must invalidate it on *Catholic Bishop* grounds. See also *United States* v. *Locke*, 471 U.S. 84, 96 (1985) ("[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question" (quoting *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)); *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (court should not adopt construction of statute necessary to avoid constitutional question unless construction is "fairly possible"). See generally *Board of Education* v. *Mergens*, 110 S. Ct. 2356 (1990) (adopting broad construction of Equal Access Act even though broad construction raised Establishment Clause questions).

[36] As we have explained (note 8, *supra*), the First Circuit invalidated the regulations as unconstitutional; however, it held that Title X authorizes the Secretary to promulgate Section 59.8 (prohibiting abortion counseling) and

first, the regulations' limitations on abortion counseling, referral, and advocacy (42 C.F.R. 59.8, 59.10), and second, the program integrity requirements (42 C.F.R. 59.9).

1. It is well established that when a court reviews an agency's construction of a statute that the agency administers, the court must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In this case, Section 1008—read in light of Title X's structure, purpose and history—answers the precise question at issue: Title X projects may not engage in abortion counseling, referral or advocacy. But even if the Court determines that Section 1008 does not address that precise question, the agency's answer is plainly based on a permissible construction of the statute.

a. The starting point for determining Congress's intent is, of course, the language of the statute. *E.g.*, *Community for Creative Non-Violence* v. *Reid*, 109 S. Ct. 2166, 2172 (1989). Section 1008 states:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

42 U.S.C. 300a-6. Petitioners concede that this language forbids Title X family planning projects from performing abortions. See Rust Br. 41; N.Y. Br. 12. They contend, however, that this is all that the section prohibits. In their view, a Title X project may encourage or promote abortions through counseling, referral, and advocacy. Rust Br. 41-44; N.Y. Br. 11-13.[37]

Section 59.10 (prohibiting abortion advocacy). *Massachusetts*, 899 F.2d at 64. Thus, the courts of appeal are in disagreement only with respect to Section 59.9, which deals with program integrity.

[37] Petitioners' position champions what amounts to an extreme departure from past, as well as present, HHS policy. HHS has consistently rejected the assertion that Title X projects are prohibited only from actually performing

As the court of appeals aptly stated, "[t]his is a highly strained construction of Section 1008." Pet App. 47a. Congress enacted Title X, among other purposes, to "make readily available information (including educational materials) on family planning and population growth to all persons desiring such information." Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 2(5), 84 Stat. 1504. A principal function of a Title X project is to provide clients with "information or 'counseling' as to a range of methods of family planning." Pet. App. 47a. If the Title X project provides information or counseling that characterizes abortion as a family planning option, then it has become a "program[ ] where abortion is a method of family planning." 42 U.S.C. 300a-6.[38]

As the court of appeals explained, it would make little sense to say that a program that counseled clients about the use of contraceptives or referred clients to other entities whose principal business is the provision of contraceptives is not a program where contraception is a method of family planning. See Pet. App. 47a. Similarly, "it would be wholly anomalous to read

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abortions. Since 1972, HHS has "interpreted section 1008 not only as prohibiting the provision of abortion but also as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning." 53 Fed. Reg. 2923 (1988). See Memorandum from Carol Conrad, *supra*, note 3. See discussion, pp. 41-42, *infra*. Thus, it is petitioners, not HHS, that seek "a dramatic reversal of agency policy." N.Y. Br. 8.

[38] Petitioners attempt to escape that conclusion by arguing that Title X subsidizes "family planning *methods and services*." N.Y. Br. 11 (quoting, with emphasis added by petitioners, 42 U.S.C. 300(a)). They contend that while abortion is a family planning method, abortion counseling is a service and is therefore immune from Section 1008. See Rust Br. 41-42; N.Y. Br. 12-13. This argument is unavailing. Even if the Title X project is providing abortion counseling as a "service," that service treats abortion as a "method of family planning." The Title X project thus becomes a "program[ ] where abortion is a method of family planning." 42 U.S.C. 300a-6. Petitioners also contend that abortion, as they describe it, is not a " 'family planning' option equivalent to diaphragms, IUDs, oral contraceptives, and other pregnancy prevention options"; instead it is "a backup to contraceptive or human failure." Rust Br. 41 n.74. The fact remains that the use of abortion to terminate an unwanted pregnancy is the use of abortion as a method of family planning, "backup" or otherwise.

Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a method of family planning." *Ibid.*

Title X's legislative history confirms that interpretation. The Conference Report, which petitioners acknowledge is "a legislative source entitled to great weight" (N.Y. Br. 14-15), explains:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used *only* to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities.

H.R. Conf. Rep. No. 1667, *supra*, at 8-9 (emphasis added). Thus, the Conference Report confirms that services directed to the termination rather than prevention of pregnancy—such as abortion counseling, referral, and advocacy—are not within the scope of the "preventive family planning services" Congress designed Title X to subsidize.[39]

Petitioners do not question the significance of this statement, but they interpret it differently. They argue that the quoted statement implicitly authorizes abortion counseling, referral, and advocacy as "other related medical, informational, and educational activities." Rust Br. 45; N.Y. Br. 14-15. The context makes clear, however, that the mission of Title X projects is to provide "*preventive* family planning services, population research, [and] infertility services" (H.R. Conf. Rep. No. 1667, *supra*, at 8 (emphasis added)) and that the "other related" activities must be in support of *those* objectives. If a woman seeks information on non-preventive birth control measures she must go elsewhere. Similarly, if a client is diagnosed as pregnant,

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[39] The passage quoted in the text appears in the "Statement of the Managers on the Part of the House." This Court observed in *National Ass'n of Greeting Card Publishers* v. *USPS*, 462 U.S. 810 (1983), that a Manager's Statement involved there, "while certainly significant," did not have the same status as the Conference Report itself because the Statement was not available to both Houses. *Id.* at 832 n.28. Here, the Manager's Statement was appended to the Conference Report and was submitted to both Houses prior to their passage of the final bill. See 116 Cong. Rec. 39,871, 40,884 (1970).

the Title X project's preventive family planning function is at an end, and the project must refer the client to an organization that provides post-pregnancy services.[40]

Petitioners rely on several "highly generalized statements about the expansive scope of the family planning services intended to be provided by Title X grantees." Pet. App. 48a. See Rust Br. 45; N.Y. Br. 14. As the court of appeals observed, not one of those statements indicates that Title X services include abortion-related activities. Pet. App. 49a. By contrast, the more specific legislative statements indicate that Title X services do not include abortion-related activities. For example, Congressman Dingell, a principal proponent of Section 1008, advised his colleagues that "[w]ith the 'prohibition of abortion' amendment —title X, section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970). The clear implication is that Title X funds should not be applied toward abortion or toward activities that "encourage or promote" abortion. Thus, the generalized statements petitioners cite have little value in light of Section 1008's more specific language and legislative history. See *Chevron U.S.A. Inc.*, 467 U.S. at 862; *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 325 U.S. 161, 168-169 (1945) (general remarks not probative of Congress's intent on narrow issue).[41]

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[40] If Section 1008 specifically *required* funding of abortion, it would be quite reasonable to view "other related" activities to include abortion counseling, referral, and advocacy. But here, where Congress has "prohibit[ed] the use of such funds for abortion" (H.R. Conf. Rep. No. 1667, *supra*, at 8), it would be incongruous to conclude that such activities are permissible. Indeed, if a Title X project's function to provide preventive family planning services and "other" related activities includes abortion counseling, other parties could insist that Title X projects provide the full gamut of post-pregnancy services ranging from pregnancy counseling to prenatal and obstetric care. That plainly was not Congress's intent.

[41] This Court has explained that "statements by individual legislators should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress's intent." *Brock* v. *Pierce County*, 476 U.S. 253, 263 (1986). Other members expressed a similar intent that Title X should not encourage abortion. See 116 Cong. Rec. 37,371 (1970) (statement of Rep. Pickle) ("I strongly support * * * the provision in the House version of this legislation that prevents this bill from being construed as support for abortion."). See also *id.* at 37,368 (statement of Rep. Carter); *id.* at 37,370 (statement of Rep. Bush); *id.* at 37,374 (statement of Rep. Broyhill); *id.* at 37,379 (statement of Rep. Dingell); *id.* at 37,382 (statement of Rep. Rogers).

Petitioners correctly observe (N.Y. Br. 15-16 n.12) that Rep. Dingell subsequently criticized the Secretary for relying on the statements the congressman made in 1970. See Letter from John D. Dingell, Chairman, Committee on Energy and Commerce of the U.S. House of Representatives to Otis R. Bowen, Secretary of HHS (Oct. 14, 1987) (J.A. 137-139). Rep. Dingell principally asserted that the Secretary should interpret Title X in light of its post-enactment legislative history. See J.A. 138. Significantly, Rep. Dingell did not take issue with the Secretary's understanding of Title X as enacted in 1970, or with the precise content of his statement. See *ibid.* ("My statement was made in opposition to the use of Federal funds to support or encourage abortion as a form of birth control."). Instead, he took issue with the inferences that should be drawn from his statement. See *ibid.* The relevant matter, however, is the Congress's collective understanding, and whatever interpretive inferences one might draw from a floor debate, it is clear that a congressman's post hoc clarification or revision of his statements—or perhaps even change of mind—has no probative weight in determining the collective body's intent at the time of passage. See *Bread Political Action Comm.* v. *FEC*, 455 U.S. 577, 582 n.3 (1982). See also, *e.g.*, *International Union of Electrical Workers* v. *Westinghouse Electric Corp.*, 631 F.2d 1094, 1104 (3d Cir. 1980).

Petitioners rely most heavily on Title X's "subsequent" legislative history. See Rust Br. 46-48; N.Y. Br. 16-19. Post-enactment legislative history, however, provides a "hazardous basis" for determining the enacting Congress's intent. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). It is particularly suspect here. Congress has not reenacted Title X, nor has it ever amended Section 1008; Congress has simply reauthorized appropriations for the Title X program. See Pet. App. 49a & n.2. Congressional committees and individual members have offered opinions in the course of reauthorizing appropriations, but these statements cannot somehow change, *nunc pro tunc*, the meaning of the underlying statute. See *TVA* v. *Hill*, 437 U.S. 153, 190-193 (1978) ("[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress").

Moreover, as the court of appeals explained, the statements petitioners cite are "unenlightening." Pet. App. 49a-50a. Indeed, the committee reports that address the issue of abortion counseling with any degree of specificity are the least likely to reflect collective congressional intent.[42]

Petitioners go so far as to rely not only on post-enactment history but post-enactment *inaction* as well. See Rust Br. 46 n.83; N.Y. Br. 17-18. Congress's rejection of various amendments prohibiting abortion counseling does not establish that Congress approved of that practice. See Pet. App. 48a.[43] More-

[42] For example, petitioners rely heavily (N.Y. Br. 18-19) on a passage from a 1985 committee report. See H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985). That 13-page report prepared by the Committee on Appropriations deals with 18 appropriations matters ranging from "Outrage Over 'Achille Lauro' Events" (*id.* at 5) to "Downtown Component of the Metrorail Dade County Florida" (*id.* at 7), and the entire discussion of pregnancy counseling is contained in the one brief paragraph quoted in petitioners' brief. Here, as in *TVA*, the congressional committees that have jurisdiction over family planning matters "would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in Appropriations Committees' Reports." 437 U.S. at 191.

Indeed, when a 1987 report of the Committee on Labor and Human Resources suggested that Title X clients are entitled to "non-directive counseling" (S. Rep. No. 286, 100th Cong., 2d Sess. [*sic*] 14 (1987), it precipitated strong dissenting opinions. See *id.* at 23-24 (statement of Sen. Humphrey) ("Section 1008 was intended to establish a wall of separation between pregnancy prevention and pregnancy termination services. * * * Despite the statutory restriction * * *, Title X guidelines actually require abortion referral and 'non-directive' abortion counseling as part of 'options counseling'. This requirement contrasts sharply with the statute."); see also *id.* at 22 (statement of Sen. Hatch).

[43] Petitioners' amici discuss at great length the House of Representatives' 1978 rejection of amendments that would have expressly prohibited Title X projects from providing abortion-related counseling. Rep. Patricia Schroeder, *et al.* Amici Br. 19-21. As the court of appeals explained, Congress's rejection of those amendments certainly does not prove that Congress thought Title X allowed such counseling. Pet. App. 50a. Indeed, the legislative history shows that Congress did not have a clear understanding of the then-existing policy and practice concerning abortion counseling. The House rejected the amendment only after Rep. Rogers (the floor manager for Title X reauthorization) stated that Title X already prohibited abortion-related counseling and that,

over, as we explain (pp. 40-42, *infra*), even if Congress's rejection of those amendments indicated that Congress approved of a past administrative policy of allowing non-directive counseling (see p. 3, *supra*), it would not mean that the Secretary has no discretion to change that policy.[44]

b. We believe that Section 1008 prohibits Title X projects from engaging in abortion counseling and advocacy. But even if Section 1008 does not address that precise question, the agency's answer is certainly based on a permissible construction of the statute. See *Massachusetts* v. *Secretary of HHS*, 899 F.2d 53, 64 (1st Cir. 1990) (en banc).

This Court emphasized in *Chevron* that "when an agency is charged with administering a statute part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." *Department of the Treasury* v. *FLRA*, 110 S. Ct. 1623 (1990). "That is a task infused with judgment and discretion, requiring the ' "accommodation of conflicting policies that were committed to the agency's care." ' " *Ibid.* (citations omitted). The Secretary properly exercised that judgment and discretion here.

As we have already shown—and two courts of appeals have held—the Secretary's interpretation is consistent with the statute. Title X does not define the term "family planning services," nor does it enumerate precisely what types of medical

even if it did not, an amendment was unnecessary because Title X programs were not engaging in that practice. See 124 Cong. Rec. 37,046 (1978) (Rep. Rogers). See also 121 Cong. Rec. 17,219 (1975) (Rep. Rogers); 120 Cong. Rec. 21,687 (1974) (Rep. Roncallo). We discuss the defeated legislative initiatives in greater detail in our court of appeals brief. See Gov't C.A. Br. 37-44.

[44] As the First Circuit explained in rejecting an identical challenge to the Title X regulations, "such ratification would merely reflect acquiescence to a prior policy—it would not indicate that the Secretary's new policy exceeds his statutory authority." *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 61. See also *Motor Vehicle Mfrs. Ass'n.* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 45 (1983) ("even an unequivocal ratification—short of statutory incorporation—of [a regulation] would not connote approval or disapproval of an agency's later decision to rescind the regulation").

and counseling services are entitled to Title X funding and what services are not. Section 1008 does, however, specifically prohibit funding of "programs where abortion is a method of family planning" (42 U.S.C. 300a-6), the Conference Report indicates that Title X is intended to support "preventive family planning services" (H.R. Conf. Rep. No. 1667, *supra*, at 8), and a principal sponsor indicated that "abortion is not to be encouraged or promoted in any way" (116 Cong. Rec. 37,375 (1970)).[45] Thus, since 1972, the Secretary's policy has been to prohibit Title X projects from performing abortions or engaging in activities "promoting or encouraging abortion as a method of family planning." 53 Fed. Reg. 2923 (1988). See pp. 3-4, *supra*. This policy reflects a proper exercise of the Secretary's responsibility to administer a statutory program while observing the conditions that Congress has imposed on the use of public funds. Cf. *OPM* v. *Richmond*, 110 S. Ct. 2465, 2471-2473 (1990); *Heckler* v. *Community Health Services*, 467 U.S. 51, 63 (1984). The 1988 regulations implement that policy.

Petitioners argue that the Secretary's 1988 regulations are entitled to "little deference" and are "arbitrary and capricious" because they depart from previous HHS guidelines and internal memoranda. N.Y. Br. 19-26. Petitioners vastly overstate those departures. But, in any event, an agency is entitled to change its policies. As this Court has stated:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

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[45] There is room to argue that the meaning of Section 1008 is less than completely clear. Indeed, Section 1008's language is not as clear as provisions of various appropriations acts that prohibit the use of federal funds "to perform abortions" (*e.g.*, District of Columbia Appropriation Act, 1988, Pub. L. No. 100-202, § 117, 101 Stat. 1329-99), or the Adolescent Family Life Act, which prohibits the funding of programs "which provide abortions or abortion counseling or referral" (42 U.S.C. 300z-10). There is no room to argue, however, that Section 1008 unambiguously states what petitioners contend: that Section 1008 prohibits the performance of abortions but nothing else.

Chevron, 467 U.S. at 863-864. Accord *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *American Trucking Ass'n* v. *Atchison, T. & S.F. R.R.*, 387 U.S. 397, 416 (1967). The relevant question is whether an agency's revision of an existing policy is "rational, based on consideration of the relevant factors, and within the scope of authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. The Secretary's new regulations clearly meet that test.

As we have explained (pp. 3-4, *supra*), HHS has consistently followed the policy of forbidding Title X projects from activities that "encourage or promote" abortion; the question that continually arose from 1971 through 1981 was whether specific practices were consistent with that "non-encouragement" policy. 53 Fed. Reg. 2923 (1988).[46] In 1981, the Secretary issued guidelines that required Title X projects to offer "non directive" counseling and referral for abortion based on the premise that those activities "did not have the effect of promoting or encouraging abortion." *Ibid.* Shortly thereafter, however, the GAO and OIG issued their reports, finding that Title X projects were engaging in questionable practices and recommending that the Secretary "give more specific, formalized direction to pro-

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[46] See Memorandum from Joel M. Mangel, Deputy Ass't General Counsel, to Louis M. Hellman, M.D., Deputy Ass't Secretary for Population Affairs (Apr. 20, 1971) (J.A. 35-40) (describing HHS's "non-encouragement policy"); Memorandum from Joel M. Mangel, Deputy Ass't General Counsel, to Louis M. Hellman, M.D., Deputy Ass't Secretary for Population Affairs (Jan. 18, 1973) (J.A. 43-48) (same); Memorandum from Louis M. Hellman, M.D., Deputy Ass't Secretary for Population Affairs, to Hilary H. Connor, M.D., Regional Health Administrator (Nov. 19, 1976) (C.A. App. 134A-135) ("if you are funded under Title X, you cannot promote or encourage abortion"); Memorandum from Carol Conrad (Apr. 14, 1978), note 3, *supra* ("This office has traditionally taken the view that § 1008 not only prohibits the provision by Title X grantees of abortion as a method of family planning as part of the Title X-supported program, but also prohibits activities which promote or encourage the use of abortion as a method of family planning by the Title X-supported program."). J.A. 56. Petitioners' contrary characterizations are based on incomplete renditions of the relevant memoranda. See Rust Br. 43-44; N.Y. Br. 21 n.20.

grams about the extent of prohibition on abortion as a method of family planning." *Id.* at 2923-2924. See J.A. 82. The Secretary took that advice and in the process of conducting "informed rulemaking" duly reconsidered "the wisdom of its policy" (*Chevron,* 467 U.S. at 863-864). The Secretary determined, for the reasons we have explained, that abortion counseling, referral, and advocacy are inconsistent with Section 1008 and "promote or encourage" abortion. See 53 Fed. Reg. 2923-2924 (1988). The Secretary also determined, based on the GAO and OIG findings, that the guidelines set forth in the regulations were necessary to implement properly the statute and to prevent program abuses. *Ibid.* He therefore promulgated the regulations at issue here, responding in detail to public comment, including the complaints voiced by petitioners in this case. See *id.* at 2924-2943.

In short, the Secretary examined the relevant data, including the GAO and OIG reports and public comments, and articulated "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. He did not reach the conclusion that petitioners would prefer, but that is not the issue. His decision "was based on a consideration of the relevant factors" and does not reflect any "clear error in judgment." *Ibid.* See *Robertson* v. *Methow Valley Citizens Council,* 109 S. Ct. 1835, 1848-1849 (1989). Thus, as both the First Circuit and the Second Circuit concluded, the abortion counseling, referral, and advocacy regulations are entitled to deference and must be upheld. See Pet. App. 51a-52a; *Massachusetts,* 899 F.2d at 62-64.[47]

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[47] Petitioners make a number of exaggerated claims about the application of the regulations, suggesting, for example, that Title X project counselors cannot even say "the word 'abortion' to their patients" (N.Y. Br. 5) and that the telephone yellow pages "must be purged from the waiting rooms" of Title X facilities. Rust Br. 26. That hyperbole is not accurate. See 42 C.F.R. 59.8(a)(4), 59.8(b)(5); 53 Fed. Reg. 2941. See also Pet. App. 45a n.1. In any event, a court should not sustain a facial challenge to a regulation based on suggested fanciful applications, particularly those that the agency itself has rejected. See *Bowen* v. *Yuckert,* 482 U.S. 137, 154 n.12 (1987).

2. Petitioners' challenge to the Secretary's new "program integrity" regulations (42 C.F.R. 59.9) is likewise flawed. Petitioners contend that Congress did not authorize the Secretary's requirement that a Title X project "must be organized so that it is physically and financially separate" from activities that are prohibited by Section 1008 (42 C.F.R. 59.9) and, furthermore, that the requirement is unreasonable. N.Y. Br. 26, 30; see Rust Br. 48-50. Both contentions are incorrect.

Title X empowers the Secretary to promulgate regulations for administration of Title X grants and contracts. See § 1006(a), 42 U.S.C. 300a-4(a). This power includes the authority to promulgate regulations that are "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 369 (1973). The Secretary's program integrity regulations are designed to assure that Title X grantees apply federal funds only to federally authorized purposes and that the grantees avoid creating the appearance that the government is supporting unauthorized activities.[48] This obviously is a permissible regulatory objective.

Furthermore, the specific requirements that the regulation imposes are in no sense arbitrary. In fact, HHS has consistently taken the position that Section 1008 requires some degree of

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[48] There is a manifest need for effective separation between a Title X project and prohibited activities; without it, an abortion clinic could be fully integrated into a Title X program, distinguished only by the bookkeeper's imagination in "allocating" the costs of abortions to non-Title X funds. That integration would result in a Title X project subsidizing or promoting abortion services. 53 Fed. Reg. 2940-2941 (1988); 52 Fed. Reg. 33,212-33,213 (1987). The Secretary noted that the program integrity regulations were "independently justified by the need to prevent existing or potential clients of Title X projects—as well as the general public—from concluding that the government endorses abortion." *Id.* at 33,212. The government has a legitimate interest in preventing such misapprehensions. See note 24, *supra.* Cf. McConnell, *Political and Religious Disestablishment,* 1986 B.Y.U. L. Rev. 405, 457 ("[o]nly a physical separation can prevent aid to the non-advocacy aspects of an organization's activities from accuring to the benefit of its advocacy by defraying a portion of the joint or common costs, and only a physical separation can preclude the intertwining of the government-funded activity and the organization's political or religious advocacy").

physical and financial separation between Title X projects and abortion-related activities.[49] However, based on experience, the Secretary concluded in the course of preparing the 1988 regulations that the informal guidance that HHS had previously given had failed to assure adequate separation. The GAO and OIG reports and testimony from private individuals revealed that grant recipients frequently failed to keep their Title X preventive family planning and infertility services separate from their abortion-related activities; consequently, there was a real likelihood that federal funds were being used for prohibited purposes. See 53 Fed. Reg. 2924 (1988); 52 Fed. Reg. 33,212 (1987). The Secretary's regulations responded directly to those findings. See *United States* v. *Kokinda,* 110 S. Ct. 3115, 3124 (1990) (plurality opinion) (change in Postal Service regulation governing solicitation based on "real-world experience").

The Secretary's new regulations require HHS to apply four specific non-exclusive criteria "to make case-by-case determinations as to whether a given Title X project is physically and financially separate from prohibited activities." 53 Fed. Reg. at 2940. These four requirements are not "arbitrary and capricious"; they are all rationally related to the objective of assuring that federal funds are not used to "promote or encourage" abortion. Indeed, petitioners do not suggest otherwise.[50]

[49] For example, the Office of General Counsel issued an opinion in 1973 that concludes, in pertinent part:

> [A] mere technical allocation of funds, attributing Federal dollars to non-abortion activities and other dollars to abortion activities, in what is otherwise a discrete project for providing abortion services, would not, in our opinion, be a legally supportable avoidance of the section 1008 prohibition.
>
> In our opinion, the activities (abortion and non-abortion) must be so separated as to constitute separate programs (projects). As we have already indicated, our conclusion does not require separate grantees or even a separate health facility. However, neither do we think that separate booking entries alone will satisfy the spirit of the law.

Memorandum from Joel Mangel, Deputy Ass't General Counsel, to Albert B. Lauderbaugh, Chief, Office of Field Operations, National Center for Family Planning Services (Apr. 10, 1973). See also Memorandum from Carol Conrad (Apr. 14, 1978) (J.A. 59) note 3, *supra*.

Petitioners' complaint, at bottom, is that the program integrity regulation is arbitrary because it will cost grantees money in the form of "duplicating facilities and personnel" (N.Y. Br. 30) and because it will be applied in an arbitrary manner (*id.* at 30-31). Petitioners' first argument, however, is just another way of saying that Title X projects should subsidize other programs, including abortion-related services. As we have shown, that is what Section 1008 is designed to prevent. Petitioners' second argument goes beyond the bounds of their ostensibly facial challenge to the regulation.[51] Moreover, a grantee can "expect no less than to be held to the most demanding standards in its quest for public funds." *Community Health Services,* 467 U.S. at 63. This is particularly so when "real-world experience" has given the Secretary ample reason to believe that some of those who have sought program funds in the past have failed to "act with scrupulous regard for the requirements of law." *Ibid.*

[50] Section 59.9 states that the Secretary "will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to): (a) the existence of separate accounting records; (b) the degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) the existence of separate personnel; and (d) the extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent." 42 C.F.R. 59.9.

[51] That argument is both inappropriate in a facial challenge and not borne out by experience. The regulations have been enjoined in most areas of the Nation pending the outcome of the various legal challenges. However, they have been implemented in portions of five States (Kentucky, Iowa, Texas, Nevada, and South Dakota) and all of the territories. To date, no issues of compliance with 42 C.F.R. 59.9 have been raised. Clearly, petitioners have no basis whatsoever for contending that the Secretary will apply the criteria of that section in an arbitrary manner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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